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No. 07-630

Supreme Court, U.S.
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In The
Supreme Court of the United States

MARY SCOTT,

Petitioner,

v.

METROPOLITAN HEALTH CORPORATION,
d/b/a METROPOLITAN HOSPITAL,
and MICHAEL FAAS,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 2

I. The District Court Abused Its Discretion and Denied Scott Due Process by Awarding Sanctions for Subjective Bad Faith Without a Hearing. 2

A. The Court Could Not Make the Character and Credibility Determinations It Did Without a Hearing, Regardless of Whether a Hearing Was Requested. 2

B. Respondents Waived Their Procedural Default Arguments on Appeal. 8

II. The Sanctions Award Against Scott Was Grossly Excessive and Cannot Be Justified by Any Finding the Court Could Have Reached Without a Hearing. 11

CONCLUSION 12

TABLE OF AUTHORITIES

CASES

Chambers v. NASCO, Inc.,
501 U.S. 32 (1991) 3

Cook v. American S.S. Co.,
134 F.3d 771 (6th Cir. 1998) 10

Experimental Holdings, Inc. v. Farris,
503 F.3d 514 (6th Cir. 2007) 9

Ohio Bell Tel. Co. v. Pub. Util. Comm. of Ohio,
301 U.S. 292 (1937) 3

Rogal v. ABC,
74 F.3d 40 (3d Cir. 1996) 5

Singleton v. Wulff,
428 U.S. 106 (1976) 11

Teague v. Lane,
489 U.S. 288 (1989) 9

U.S. v. Quiroz,
22 F.3d 489 (2d Cir. 1994) 8

Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.,
546 U.S. 394 (2006) 11

White v. General Motors Corp.,
908 F.2d 675 (10th Cir. 1990) 11

Wilson-Simmons v. Lake County Sheriff's Dep't,
207 F.3d 818 (6th Cir. 2000) 8, 9, 10

OTHER

16A Wright, Miller & Cooper, Fed. Practice & Proc.
§ 3975 9

INTRODUCTION

This case presents an opportunity for this Court to answer two unresolved questions of law critical to the expectations of every person who considers bringing a legal claim, especially potential whistleblowers and discrimination complainants: (1) whether it violates due process and abuses a court's discretion to make credibility and subjective bad faith determinations without a hearing; and (2) whether there are any effective limits preventing courts from using their inherent powers to award sanctions that are disproportionate to any litigation misconduct.

These questions must not be obscured by Respondents' attempt to focus the Court's attention solely on questions of procedure, nor by their lengthy recasting of the factual background of the case. Respondents raise a preliminary question regarding the potential forfeiture of Petitioner Mary Scott's due process argument, but there is no such question regarding Ms. Scott's virtually identical abuse-of-discretion challenge to her lack of a hearing, and Respondents "waived waiver" by addressing the merits of both issues on appeal without making a forfeiture argument.

As for the factual background, a line-by-line refutation of Respondents' extensive indictment of Scott's character would serve no purpose. Scott's petition does not turn on whether this Court agrees with Respondents' opinion of her qualities as an employee or a litigant. Instead, all of the facts relevant to this Court's determination can be summarized as follows: the district court, without a

hearing, premised an award of sanctions on findings regarding Scott's credibility, her subjective bad faith, and her role as the "driving force" behind any litigation misconduct, ignoring her attorneys' evident share of the responsibility; and it awarded Respondents the entire amount of their attorneys' fees to punish Scott for alleged misconduct that had no effect on the disposition of her claims.

Irrespective of whatever may have occurred during the litigation below, and regardless of whether Scott even requested a hearing, this Court should grant certiorari to hold that the demands of judicial discretion and due process do not permit a court to draw conclusions regarding a party's character and her credibility—or rely on such conclusions to levy massive, disproportionate sanctions—without ever meeting the party or holding a hearing that could provide some meaningful basis for such conclusions.

ARGUMENT

I. The District Court Abused Its Discretion and Denied Scott Due Process by Awarding Sanctions for Subjective Bad Faith Without a Hearing.

A. The Court Could Not Make the Character and Credibility Determinations It Did Without a Hearing, Regardless of Whether a Hearing Was Requested.

First, and most important, Scott's rights were not forfeited or waived when she failed to make a formal

request for a hearing before the district court.[1] In fact, whether Scott requested a hearing is immaterial; the district court abused its discretion and ignored due process when it based its sanctions award on numerous findings that it could not conceivably have made other than through a hearing.

This is not to say that a hearing is necessary prior to every sanction. Certainly, there may be cases where written filings are sufficient to resolve a sanctions dispute. Respondents claim this was such a case and portray Scott's due process challenge as an effort to avoid the sanctions against her on purely technical grounds. This could not be further from the truth. The court's findings were not inevitable (or logical) inferences drawn from a clear paper record. Instead, they were the product of a court that deemed itself capable of resolving questions of credibility and character by judicial intuition: the foreseeable result of a "standardless exercise of judicial power." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 68 (1991) (Kennedy, J., *dissenting*). As Justice Cardozo wrote, due process is "the protection of the individual against arbitrary action," *Ohio Bell Tel. Co. v. Pub. Util. Comm. of Ohio*, 301 U.S. 292, 302 (1937), and arbitrary action is what occurred.

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[1] Respondents claim Scott not only forfeited, but *waived* her rights by requesting a hearing as to a motion, then withdrawing the motion. (Brief in Opposition at 27-28). Respondents fail to explain, though, how such a waiver could be accomplished through a withdrawn request for a hearing as to *admittedly different subject matter*. (*Id.* at 17 n.15).

The alleged discovery abuse here arose from a failure to timely disclose relevant evidence, particularly complete tapes of the February 7, 2002 Metropolitan Enterprises Board meeting, which Scott voluntarily disclosed and attempted to use in her favor in opposing summary judgment. The district court treated this untimely disclosure as if Scott was caught concealing a smoking gun. It imbued the tapes with talismanic significance, grossly out of proportion to their actual importance, and ignored the fact that Scott obviously viewed the evidence as supportive of her claims.[2] It inferred from a silent record that Scott concealed evidence intentionally and malevolently, and that her explanations were false. The court considered Scott's attorneys' claims, supported by sworn testimony, that they had possessed the tapes for months and believed they had disclosed them, but it deemed these representations false based on its own speculation. (App. E, 113a). It refused to investigate the matter further, even to assign responsibility to the attorneys it apparently believed had perjured themselves, as it found Scott was "the driving force" behind any misconduct. (App. 125a, n.12). Finally, it drew broad conclusions as to Scott's credibility[3] and

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[2] The court stated that the tapes "doomed her retaliation claim" by demonstrating Scott's version of the February 7 minutes were inaccurate (Petition Appendix E, 99a), despite acknowledging in the same opinion that "[Scott] has consistently claimed that she [amended the minutes] to incorporate by reference prior discussions not included in the meeting." (App. 106a, n.7).

[3] E.g., App. 106a, n.7 ("The Court notes for the purpose of this record that it frankly disbelieves [Scott's] account. . . .").

her character,[4] and it relied on those conclusions to levy the most severe sanction possible: over $1,600,000 in attorneys' fees.[5]

This piling of unfavorable inference upon unfavorable inference is symptomatic of a court that has abandoned due process. The resolution of a sanctions dispute about an untimely disclosure did not require an examination of Scott's character. The district court chose to conduct that examination, and did so despite lacking anything that could inform such analysis. The only way to collect the necessary information was by holding an in-person hearing, allowing the court to weigh Scott's credibility and providing Scott with an opportunity to explain any inconsistencies in her account. Instead of holding a hearing, whether by request or *sua sponte*, the court filled in the gaps in its knowledge with two woefully inadequate substitutes: its own suppositions and Respondents' summary judgment affidavits. See *Rogal v. ABC*, 74 F.3d 40, 45 (3d Cir. 1996) (holding that even trial testimony in sanctioning judge's presence was inadequate substitute for sanctions hearing, given lack of equivalent opportunity at trial to clarify inconsistencies and show good faith).

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[4] E.g., App. C, 84a n.16 ("[N]o amount of sanction is sufficient to deter [Scott] from future misconduct."); App. 90a ("[Scott's] conduct in this suit has been disreputable and it would be foolish to expect something else in the future.").

[5] Respondents argue that the attorneys' fees awarded were a less severe sanction than the dismissal of Scott's claims would have been (Brief in Opposition at 32), but of course, Scott's claims had already been dismissed through summary judgment.

Because the court was certain it understood the true nature of everything that took place from the time Respondents hired Scott, it believed it did not need to meet Scott or hear her explanations to know that every word written on her behalf was a lie. The court did not possess any significant evidence it did not have when it reviewed the parties' summary judgment filings; it simply believed itself free of the burdensome limitation of drawing reasonable inferences in Scott's favor. It had already surmised, in granting summary judgment, that Scott was a bad employee, a bad manager, and a liar: after all, in the court's eyes, Scott was the type of person who terrorized her subordinates, even allowing them to be bitten by her own dog (App. G, 146a, n.9 (stating that if this story was "fiction, it was well crafted")), then had the gall to portray herself as "the corporate/FCA avenger" (App. 164a). Such allegations, untested by cross-examination and produced in the midst of "a long and bitter" lawsuit (App. C, 60a), were the foundation of the court's estimation of Scott's character.

Not limiting itself to drawing factual conclusions from the disputed affidavits of interested witnesses, the court also explicitly faulted Scott for her lack of proper remorse for her mistreatment of her fellow employees.[6] It did not offer any advice as to when, in

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[6] See App. C, 64a ("[Scott] has not displayed any semblance of self-responsibility or remorse concerning . . . her wrongful workplace conduct . . . ."). This sentiment was echoed by the Sixth Circuit panel. See App. B, 16a (stating that Scott should have "tried to address the gravamen of [other employees'] complaints and change how she came across to a wide range of colleagues and subordinates—rather than merely attacking the complainants").

a case where she did not appear before a judge except through her lawyers' written filings, Scott should have expressed remorse or thrown herself on the mercy of the court. Written briefs gave Scott no opportunity to express contrition even for any litigation misconduct, much less for her supposedly wrongful conduct *prior to litigation*.

The court's conclusions about Scott are extreme, arguably unbefitting the dignity of the federal courts, and totally unjustified by the facts of this litigation. What elevates these case-specific injustices to an abuse of discretion and a controversy of constitutional significance is the fact that the court drew these passionate conclusions without ever having met Scott, much less having given her an opportunity to be heard in a meaningful way: that is, an opportunity to explain her actions to the court in person, so that it could make an informed determination whether her explanations were true; an opportunity to demonstrate that she had acted in good faith, and was not the monstrous figure portrayed by Respondents' briefs and affidavits; and, if the court deemed her "self-responsibility" an important consideration, an opportunity to express remorse in an appropriate context as to any conduct she was unable to explain.[7]

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[7] Notably, the opportunity for Scott to restore her reputation through a hearing in response to the ruinous allegations against her is not available through a collateral action against her own attorneys, contrary to Respondents' claim that such an action could make Scott whole. Brief in Opposition at 29.

B. Respondents Waived Their Procedural Default Arguments on Appeal.

Respondents claim that, in addition to her failure to request a hearing, Scott forfeited her rights by failing to raise the issue properly before the Sixth Circuit. As Respondents acknowledge, a party who argues the merits of an issue on appeal without making a forfeiture or waiver argument waives the right to later argue that the issue has been forfeited or waived. Brief in Opposition at 25 (citing *U.S. v. Quiroz*, 22 F.3d 489 (2d Cir. 1994)). Respondents cannot dispute that Scott raised her entitlement to a hearing in her appellate brief, referring to the court's failure to hold a hearing as an abuse of discretion. (App. K, 201-02a). This argument gave Respondents an opportunity to argue Scott had forfeited this issue by failing to request a hearing or briefing the issue inadequately. Instead, Respondents chose to address the issue solely on its merits, citing *Wilson-Simmons v. Lake County Sheriff's Dep't*, 207 F.3d 818, 822 (6th Cir. 2000) for the principle that no hearing was required prior to sanctions. (App. J, 199-200a). As to the abuse of discretion claimed by Scott, then, there can be no question that Respondents have affirmatively waived such arguments.

Respondents also waived their forfeiture argument as to the constitutional due process aspects of Scott's lack of a hearing. They dispute this waiver, claiming the due process argument was not presented "in a forum where Respondents could object." Brief in Opposition at 25-26. This is simply not true: Respondents could certainly have objected to the presentation of this argument on appeal, when it was

raised and briefed at length by *amicus* NELA. (App. I, 191-98a). See 16A Wright, Miller & Cooper, Fed. Practice & Proc. § 3975 (describing motion to file *amicus* brief and stating, "Any party may file a written opposition to the motion."). In light of Respondents' failure to object at that time, Respondents should not now be heard to claim Scott has forfeited or waived her due process argument.[8]

Even if Respondents are correct that their forfeiture argument has been preserved, this Court should grant review notwithstanding any forfeiture. Any failure by Scott to raise or brief this issue did not prejudice Respondents or deny the Sixth Circuit an opportunity to consider it, as Scott's due process argument is virtually identical to her abuse-of-discretion argument, which was preserved. The only distinction between the two issues is the use of the term "due process." Such a distinction can be quite important, see, e.g., *Experimental Holdings, Inc. v. Farris*, 503 F.3d 514, 520 (6th Cir. 2007) (stating that "the mere words 'abuse of discretion' are not sufficient to turn a state procedural violation into a federal due process case"), but it is irrelevant here. At least in the Sixth Circuit, the terms "abuse of discretion" and "due process" are used interchangeably in this context. Indeed, *Wilson-Simmons*, cited in Respondents' appellate brief (App. J, 199-200a), addresses the

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[8] NELA's 6th Circuit brief can also be seen as an extension of Scott's argument and not an attempt to "expand the scope" of her appeal. See *supra* (noting similarity between Scott's due process and abuse-of-discretion arguments); see also *Teague v. Lane*, 489 U.S. 288, 300 (1989) (addressing issue raised only by *amicus*).

question of whether a hearing is required prior to attorney sanctions in terms of abuse of discretion, but relies on *Cook v. American S.S. Co.*, 134 F.3d 771, 774 (6th Cir. 1998), a due process case, for the proposition that, at minimum, " 'the attorney must be given notice and an opportunity to be heard.' " 207 F.3d at 822.[9]

In the absence of prejudice, the reasons for excusing any forfeiture by Scott are overwhelming. First, as discussed in depth in her petition, Scott's counsel and the court both ignored the obvious conflict of interest between Scott and those of her counsel who were potentially at fault for any litigation misconduct. Respondents' argument that Scott's counsel were not targeted for sanctions, and thus had no conflict, is disingenuous. Respondents alleged Scott was primarily responsible, but they also plainly implicated her attorneys in their motion. See App. M, 209a n.49 (stating bases upon which Scott's attorneys should be liable for sanctions).[10]

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[9] It should be noted that the district court cited *Wilson-Simmons* and *Cook* for the same propositions and concluded no hearing was necessary (App. C, 74a), meaning any lack of a formal request was not only without prejudice to Respondents, but also without practical effect on the court's reasoning.

[10] Nor does Scott's husband's status as one of her counsel dispel the conflict. While Respondents cite this detail frequently, they fail to identify any authority for a rule that would impute an attorney's knowledge to a litigant whose spouse is an attorney or eliminate a conflict between such a litigant and her other attorneys. They also ignore the fact that the conflict here was between Scott and those attorneys who bore potential

Second, the Court would be within its discretion to consider Scott's due process issue as plain error. Even assuming Respondents are correct that Rule 24.1(a) permits review of a forfeited question only if it is *not* presented at the petition stage, Brief in Opposition at 26, the other authority cited in Scott's petition would plainly justify plain error review under these circumstances. See *Singleton v. Wulff*, 428 U.S. 106, 121 (1976) ("Certainly there are circumstances in which a federal appellate court is justified in resolving an issue not passed on below, as where the proper resolution is beyond any doubt, *or* where injustice might otherwise result." (citations and quotations omitted) (emphasis added)); *White v. General Motors Corp.*, 908 F.2d 675, 685 (10th Cir. 1990) (considering whether hearing was necessary *sua sponte* in light of conflict); see also *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 408 (2006) (Stevens, J, *dissenting*) ("Arguments raised for the first time on appeal may be entertained . . . if their consideration would prevent manifest injustice.").

II. The Sanctions Award Against Scott Was Grossly Excessive and Cannot Be Justified by Any Finding the Court Could Have Reached Without a Hearing.

Respondents address Scott's second question presented only briefly, in footnotes, but the purpose of their arguments is to rehabilitate the link between Scott's alleged misconduct and the district court's

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responsibility for any misconduct; this did not include her husband.

conclusion that her conduct rendered her action frivolous. This link simply does not exist; nor did the court make any significant effort to establish such a link, as the law in other circuits demands (Petition, Section II(A), at 21-22), and as this Court should clarify is an absolute prerequisite to sanctions for litigation misconduct. Instead, it is evident from any fair reading of the opinions below that the amount of the court's sanctions was premised on its view of Scott personally—that is, its findings regarding her general credibility and character and its wholesale acceptance of the factual assertions in Respondents' briefs and affidavits. The demands of judicial discretion and due process dictate that a court may not make such findings without the benefit of a hearing.

CONCLUSION

For the reasons set forth above, Petitioner respectfully submits that this Court should grant her request for a writ of certiorari.

Respectfully submitted,

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